

Wage Determination and Payroll Review (Davis-Bacon Act Compliance)

The Federal Clean Water Revolving Loan Fund appropriation has recently included language to require that all new revolving loan fund wastewater projects comply with the Davis-Bacon and Related Acts (DBA). Federal wage laws are applicable to all construction contracts and/or subcontracts in excess of \$2,000 which are part of the loan project. Davis Bacon and related Acts include the Davis-Bacon Act, Contract Work Hours and Safety Standards Act, the Copeland Act, prevailing wage provisions of Davis-Bacon related Acts, and 29 C.F. R. Parts 1, 3, and 5 which govern the administration and enforcement of the DBA, DBRA, and CWHSSA.

The Davis-Bacon Act stipulates that all laborers and mechanics employed by a contractor or subcontractors shall be paid wages at rates not less than those prevailing on similar construction in the area as determined by the Secretary of Labor. The Department of Labor periodically issues wage determinations for geographic areas throughout the United States. The Department of Labor's "Withholding Division" can be accessed at <http://www.wdol.gov/> or directly at <http://www.gpo.gov/davisbacon/va.html>. The websites provide details on other rules and regulations applicable to projects utilizing federal funding.

This guidance attempts to explain these requirements as they apply to Virginia Clean Water Revolving Loan Fund financed projects but in no way supersedes those requirements or the Department of Labor's authority over these requirements.

Loan Recipient Responsibilities

The loan recipient must monitor all aspects of their project but in the case of Davis Bacon Act, they have specific responsibilities:

1. Include the latest DEQ Office of Clean Water Financing and Assistance (previously Construction Assistance Program) "Contract Inserts" in the contract documents.
2. Determine which wage determination or determinations are needed for the type of construction and geographic area and include with the contract inserts.
3. Address the requirements of the Davis Bacon Act and payroll review at the preconstruction conference.
4. Require the general contractor or anyone directly contracted by the loan recipient that utilizes labors or mechanics for construction to submit weekly payrolls to the loan recipient for review and concurrence. The prime contractor must insert the labor standard requirements into every subcontract. Any contractor employing subcontractors must gather and submit weekly payrolls of all subcontractors with subcontracts greater than \$2,000. Payrolls are to be submitted to the loan recipient no later than seven days following the end of the payroll week.
5. Assign personnel (which may be contracted) to review weekly payrolls of the general contractor and all subcontractors with subcontracts greater than \$2,000. Examine weekly payroll data to verify that contractors and/or subcontractors are paying the appropriate wage rates. Verify that all subcontractors are accounted for and have submitted weekly payrolls for review. Immediately conduct interviews in response to any alleged violation of the prevailing wage requirements. The loan recipient must use Attachment #5 (DOL Form #347) of the Contract Inserts or equivalent documentation to memorialize the interviews. This form can be downloaded from the DOL's Withholding Divisions website as well. Other forms may be used that contain all of the required information.

6. The loan recipient or agent should periodically:
 - a. Verify that contractors and subcontractors include covered employees in fringe benefit plans as provided for in the Department of Labor wage determinations.
 - b. Periodically review contractor's and subcontractor's use of apprentices and trainees and verify registration in Department of Labor approved programs. If the contractor's evidence is not sufficient, contact the Bureau of Apprenticeship and Training and/or the state apprenticeship council for verification. The ratio of apprentices to journeymen on the project should not exceed the ratio provided for in the apprenticeship/training plan. The ratio is determined on a daily basis, not weekly.
7. Ensure all EEO, OSHA, Wage Determination, and any other required postings are displayed on each work site. The Davis Bacon Act Poster (WH 1321) shall be posted and have the loan recipient's designated representative listed as the Contracting Officer.

DEQ or EPA may monitor the performance of the loan recipient in its enforcement and compliance of the minimum wage rules and regulations. Payrolls and basic records shall be maintained by the contractor and each subcontractor for a period covering three years from the date of completion of the contract for all laborers, mechanics, apprentices, trainees, watchmen, helpers, and guards working at the site of the work. The loan recipient shall also maintain their records of payrolls, payroll reviews, on-site subcontractors, and compliance actions for at least three years after completion of the work.

Preconstruction Conference

The loan recipient should attempt to reduce the possibilities of labor standards violations by taking preventative measures to minimize misunderstanding of what is required. The loan recipient shall hold a preconstruction conference. One purpose of the preconstruction conference is to apprise the contractor and all available subcontractors of their responsibilities and obligations concerning compliance with the minimum wage laws. The loan recipient and the contractor should review the wage determinations applicable to the contract, and determine which rates are applicable to each segment of work if there is more than one wage determination included in the specifications. They should also review the wage determination(s) to be sure that it includes all the classifications of laborers and mechanics that will be employed under the contract. If additional job classifications are needed, an SF 1444 form must be submitted to DOL through DEQ.

Wage Determination(s)

The loan recipient is responsible for obtaining a wage determination or determinations for the proper construction category and the geographic area of the work from the Department of Labor (see "Wage Determinations On Line" at (<http://www.wdol.gov>), and incorporating the appropriate wage determination into the construction specifications. The Wage Determinations website allows you to select your state and county and then provides a list of wage determinations by construction category. See Section C of the Wage Determinations On Line User Guide for a full discussion of DOL construction schedules. The most common construction categories for wastewater projects are "Building" and "Heavy". In brief, DOL defines Building as construction, rehabilitation, and repair of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment, or supplies. Heavy involve those projects, generally public work, which cannot be classified as Residential, Building, or Highway. Water and Sewer may be a subsection of heavy construction that relates to laying or repairing lines or may be included as a separate schedule.

Some contracts will include multiple types of construction. For example, in the case of a force main and pump station contract both a “Building Construction” and a “Heavy Construction” wage determination will normally need to be included in the specifications. In any case, where both determinations are applicable to a project, the contractor must either separate payroll hours out by construction category and pay the minimums required for each category, or pay the highest applicable rate between the two for all work done.

In the special case that a project extends across the geographic boundaries of two or more wage determinations, a wage determination for each separate area in which work is done must be included in the specifications. Again, as in the case above, the contractor must either pay the higher rate or separate work hours out according to the geographic district in which the work is done.

Prior to publishing the Invitation to Bid, the loan recipient shall download the proper wage determination(s) for their city or county and construction category. The DOL periodically amends wage determinations. **Ten days prior to opening bids, the loan recipient must check the DOL website to ensure their wage determination has not been amended.** If it has been amended, the recipient must issue a specification addendum to include the latest wage determination in the specifications. As long as bids are opened within the ten day period and awarded within 90 days of the bid opening, the wage determinations will remain in effect for the life of the contract.

If a contract is not awarded within 90 days of bid opening, the wage determination must be checked prior to awarding the contract. If the wage determination has been updated during this period, then the new rates will apply to the contract. A change order will be needed to officially include the updated wage rates into the contract.

Payroll Review

The loan recipient is required to monitor contractor compliance. Once construction begins, the loan recipient must enforce payment of pay scales. It is strongly suggested that the loan recipient and the contractor review the wage determinations applicable to the contract and determine how the contractor will satisfy the minimum rate of pay if there is more than one wage determination included in the specifications. The loan recipient will be responsible for the weekly review of payrolls and a determination that all contractors and subcontractors did submit payrolls as required. Special attention should be paid to claimed apprentices and trainees, deductions, work hours, and pay rates according to job classification and predetermined fringe benefit rates. Consideration of the number of laborers, apprentices, and helpers should be made to ensure a disproportionate number are not utilized. *The payrolls should be examined within seven days of receipt in order to resolve problems promptly and undertake any corrective actions before they become serious and while workman are still available.*

Payroll Submittals: Each contractor and subcontractor shall furnish to the loan recipient each week a copy of their weekly payrolls for the preceding work week or partial work week. The payroll submitted shall set out accurately and completely all of the following information for each employee: their name; his or her correct classification; hourly rates paid as wages including fringe benefits or a cash equivalent thereof; daily and weekly number of hours worked; deductions made; and actual wages paid. All mechanics and laborers employed upon the site of the work will be paid unconditionally and not less than once a week.

The contractor and loan recipient are responsible for determining which subcontractors worked “on site” during the payroll period. It is recommended that the loan recipient require the contractor keep a log on all subcontractors on site each week and submit that log to the loan recipient with their payroll submittals.

Compliance Statement: Each payroll submitted shall be accompanied by a Statement of Compliance signed by the

contractor or subcontractor or his/her agent who pays and supervises the payment of persons employed under the contract and shall certify the following:

- 1) that the payroll for the payroll period contains the information noted above and that such information is true and complete,
- 2) that such laborer or mechanic employed on the contract during the payroll period has been paid the full weekly wage earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in regulation, and
- 3) that each laborer or mechanic has been paid not less than the applicable wage rate and fringe benefits or cash equivalent for the classification of work performed, as specified in the applicable wage determination.

Attachment #5 of the Contract Inserts is a suggested certification form DOL Form (#347). The form also includes a sample payroll form. These forms can be downloaded from the DOL's Withholding Divisions website as well. Other forms may be used that contain all of the required information.

Deductions: The weekly payment shall be computed at wage rates not less than those contained in the "wage determination" included in the contract specifications regardless of any contractual relationship alleged to exist between the contractor or its subcontractors and such laborers and mechanics. No deduction or rebates are allowed except those included in the Copeland Act. The DOL website addresses the types of deductions such as garnishments and dues which may be legally deducted. All deductions will be shown on the payroll form with adequate description of each deduction.

Fringe Benefits: Whenever the minimum rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination classification or pay another bona fide fringe benefit or an hourly cash equivalent thereof. If the contractor does not make payment to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, that the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account sufficient assets to meet obligations under the plan or program.

Contributions made or cost reasonably anticipated for bona fide fringe benefits under the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions above. Regular contributions made or costs incurred for more than a weekly period (but not less than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period.

If a contractor pays fringe benefits to approved plans, funds, or programs in lieu of cash they shall continue to show on the face of the payroll the basic hourly rate and overtime rate paid to his employees. Such a contractor shall indicate on the payroll form what he is paying to approved plans, funds, or programs for each craft and indicate the fringe benefit amounts are not less than were determined in the applicable wage decisions

Contractors who offer no actual fringe benefits shall pay to the employee and insert in the straight time hourly rate column of the payroll, an amount not less than the predetermined rate for each classification plus the amount of fringe benefits determined for each classification in the applicable wage decision. When overtime is paid, it is not necessary to apply the overtime multiplier to cash paid in lieu of fringes. The rate shall be the normal overtime rate plus the amount of fringe benefits determined for the employees wage classification.

Overtime: 29 CFR 5.5 requires overtime to be paid at a minimum of 1.5 times the standard wage rate, for any work performed in excess of 40 hours per workweek. Fringe benefits are not subject to this multiplier and should be paid at the standard rate regardless of the hours worked per week.

Documentation: It is strongly recommended that the review of each weekly payroll submitted be acknowledged by means such as signing/dating the document or using a log book to track the review dates.

Job Classification and Related Issues

Laborers and mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the actual time worked therein, provided, that the employee's payroll records accurately set forth the time spent in each classification in which work is performed. This includes work in multiple categories on the same Wage Determination or work in classifications on two more Wage Determinations applicable to the same contract.

Any class of laborers or mechanics employed under the contract, which is not listed in the wage determination, shall be classified in conformance with the wage decision. Additional classifications shall be requested from the Department of Labor (through DEQ) as specified in 29 CFR 5.5 or as amended using SF Form 1444. The Department of Labor will review an additional classification and wage rate and fringe benefits only when the following criteria have been met:

- (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (2) The classification is utilized in the area by the construction industry; and
- (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

The Secretary, Department of Labor, has sole authority to approve or disapprove additional wage classifications. Upon issuance of an additional classification, the new wage rate including fringe benefits where appropriate shall be paid to all workers performing the work in the additional classification from the first day on which work is performed in the classification. Attached is the DOL form for requesting additional wage classifications, SF1444. This form should be completed, signed, and sent to DEQ who will review and send to DOL for their action.

Enforcement and Corrective Actions

The contractor or subcontractor shall make the payroll records required available for inspection, copying, or transcription by authorized representatives of the owner, DEQ, EPA, or the Department of Labor and shall permit such representatives to interview employees during working hours on the job. Failure to submit the required records upon request or to make such records available may be grounds for debarment action.

The loan recipient should initiate an investigation when apparent violations are discovered. These would include valid

complaints from an employee or other knowledgeable party, habitual contract violations which indicate carelessness on the part of the contractor, discrepancies in time or payroll records, and conditions which evidence apparent falsifications. If these matters cannot be resolved through informal actions then DEQ and DOL should be notified.

If violations resulted in underpayment of wages, actions shall be taken to ensure proper restitution. The contractor should be informed in writing of required wage adjustments and the amount of payments to be made in back wages to affected employees. *The contractor shall provide evidence of such restitution by submitting a supplemental payroll containing amounts paid and copies of both sides of cancelled checks issued to the affected employees.* Should the contractor fail to make full restitution and correct violations within a reasonable period of time, funds should be withheld in amounts necessary to ensure proper restitution.

The governing body may withhold from the contractor under this contract so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics including apprentices, trainees, and helpers employed by the contractor and subcontractor, the full amount of wages required by the contract.

A breach of these contract clauses or those contract clauses continued in 29 CFR 5.5 may be grounds for termination of the contract. Falsification of a payroll certification may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of Title 18 and section 231 of Title 31 of the United States code.

The wage determination(s) shall be posted on the work site and monitored to assure that they remain posted throughout the project. The Davis Bacon poster (WH 1321) shall have the loan recipient's designated representative listed as the Contracting Officer.